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Case No. 8818

IN THE SUPREME COURT

of the

STATE OF UTAH

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GARY WOOD,

Plaintiff and Respondent,

vs.

DARRELL L. TAYLOR,

Defendant and Appellant

Respondent's Brief

FILED
AUG 6 1958
Clerk, Supreme Court, Utah

KUNZ & KUNZ,
David S. Kunz,
Attorneys for Respondent

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IN THE SUPREME COURT

of the

STATE OF UTAH

GARY WOOD,

Plaintiff and Respondent,

vs.

DARRELL L. TAYLOR,

Defendant and Appellant

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The general framework of Appellant's statement of facts is correct as far as it goes, but there are many important omissions, particularly omissions regarding events occurring immediately preceding the collision in which the Respondent sustained his injuries. For this reason the facts concerning these events are restated so that one complete picture may be presented.

The eye-witness's testimony concerning the collision comes primarily from Karen Wright, who was riding in the front seat of the automobile operated by the

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Appellant. She testified that shortly before reaching the town of Ovid, where the car made a 90° turn, that she asked the Appellant to slow down, and the Appellant replied as follows: "You're nervous, aren't you?" Witness said, "Yes," and the Appellant then said, "How many times do you think I've driven this road?" (112). Further evidence of Miss Wright's concern over the manner in which Appellant was operating his automobile and his disregard to her warnings to him is apparent by the statements she made to one of the persons who removed her from the overturned car. Witness Larry Jaussi testified as follows: "I heard Miss Wright when we got her out from under the car—she says, 'I told him to slow down, but he wouldn't listen to me.' " (86) Miss Wright also testified that shortly following her warning to the Appellant, that the automobile rounded a sharp curve in Ovid, which was about three miles north of the scene of the collision, that as the Appellant rounded this curve he had to apply his brakes, and that the car left the oiled portion of the road and went out onto the gravel at the side of the road (111).

After rounding the curve at Ovid, Miss Wright observed the speedometer to indicate a speed of 70 MPH, and she stated that she was apprehensive and nervous about the manner in which the automobile was being operated (112-113).

About two city blocks ahead of Appellant's car Miss Wright observed the tractor pulling the hay-rack come onto the highway. She thought the Appellant also observed the tractor and hay-rack, but when she

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noticed the Appellant was maintaining the same high rate of speed, she screamed, "Look out!", and then the car crashed into the hay-rack (114).

Other evidence in regard to the collision comes from Sheriff Monson, who was the investigating Officer, and who testified that the impact apparently came on the right rear corner of the hay-rack, and that the Appellant's car then proceeded forward under the hay-rack (14, 74). The Sheriff further stated that there was no indication that the Appellant applied his brakes or laid down any skid marks prior to the impact (14). Following the impact, the evidence indicates that the Appellant's car overturned several times in the air (84) and then came to rest 235 feet 7 inches from where the rear end of the hay-rack stopped (48). There is evidence that the tractor and the hay-rack stopped almost immediately upon impact (84).

Deputy Sheriff Ramey, who assisted Sheriff Monson in the investigation, testified that a car approaching the scene of the collision from the direction Appellant was travelling would have an unobstructed view ahead for thirty-five hundreths of a mile (76, 77), that an object such as a tractor and a hay-rack could be observed for fifty-five one hundreths of a mile back from the point of where the collision occurred (78). Deputy Ramey further testified that the hay-rack and the tractor did not obstruct the left half of the highway at the time of the impact as contended by Appellant in his statement of facts (74, 75, 76).

To briefly summarize the foregoing testimony of the witnesses and the physical evidence, the following

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evidence exists: The tractor and the hay-rack pulled onto the highway from a farm lane to the west of the highway and were travelling at a speed of from 4 to 5 MPH, at a time when the Appellant was about two city blocks to the North. At that time the Appellant had a clear view of the tractor and the hay-rack with no obstruction of any kind between his car and the hay-rack. Appellant continued his speed of approximately 70 MPH without application of brakes sufficient to make brake marks, skid marks, or any other evidence on the highway of attempting to slow down the automobile. The Appellant apparently continued his speed right up to the point where he came to the hay-rack, and then he attempted to pass the tractor and the hay-rack by turning out onto the narrow shoulder on the right-hand side of the roadway, although the evidence is clear that the left half of the roadway was unobstructed at that time. As Appellant attempted to pass the hay-rack, he struck its right rear quarter, passed under the right side of the hay-rack, left the highway, overturned in the air several times, and his automobile came to rest in the barrow pit upsidedown 235 feet down the road.

STATEMENT OF POINTS

POINT I

THE EVIDENCE CLEARLY SUPPORTS THE FINDING OF THE JURY THAT THE APPELLANT WAS GUILTY OF A "RECKLESS DISREGARD" OF THE RIGHTS OF THE RESPONDENT.

POINT II

IT IS PRESUMED THAT THE JURY OBEYED

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THE INSTRUCTION OF THE TRIAL COURT TO DISREGARD THE REMARKS TO WHICH APPELLANT TOOK EXCEPTION, AND IT WAS A PROPER EXERCISE OF JUDICIAL DISCRETION FOR THE TRIAL COURT TO DENY MISTRIAL.

POINT III

THE APPELLANT'S MOTION TO DISMISS, MOTION FOR A DIRECTED VERDICT, AND MOTION FOR A NEW TRIAL WERE PROPERLY DENIED BY THE TRIAL COURT.

POINT IV

THE TRIAL COURT PROPERLY RULED THAT THE VETERANS ADMINISTRATION WAS NOT A REAL PARTY IN INTEREST AND NEED NOT BE NAMED AS A PARTY PLAINTIFF.

POINT V

IT WAS ENTIRELY PROPER FOR THE TRIAL COURT TO ADMIT EVIDENCE RELATING TO RESPONDENT'S OBLIGATION, IN THE EVENT OF HIS RECOVERY FROM THE APPELLANT, TO PAY THE VETERANS ADMINISTRATION FOR MEDICAL SERVICES RENDERED HIM IN THE VETERANS HOSPITAL.

POINT VI

CONSIDERING THE PERMANENT NATURE OF THE INJURIES SUFFERED BY RESPONDENT, THE DAMAGES AWARDED ARE NOT EXCESSIVE, AND THE COURT PROPERLY ADMITTED EVIDENCE OF THE VETERANS' ADMINISTRATION HOSPITAL BILL.

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POINT VII

POLICE OFFICER ALVIN W. FOULGER WAS PROPERLY QUALIFIED AS AN EXPERT WITNESS, AND HIS EXPERT TESTIMONY WAS ENTIRELY MATERIAL AND RELEVANT TO THE ISSUES OF THE CASE.

POINT VIII

THE COURT'S INSTRUCTIONS TO THE JURY PROVIDED THE JURY WITH A FAIR AND LEGALLY CORRECT BASIS FOR CONSIDERING AND DELIBERATING UPON ALL ISSUES OF THE CASE.

ARGUMENT

POINT I

THE EVIDENCE CLEARLY SUPPORTS THE FINDING OF THE JURY THAT THE APPELLANT WAS GUILTY OF A "RECKLESS DISREGARD" OF THE RIGHTS OF THE RESPONDENT.

Respondent concedes that he was obligated to meet the requirements of the Idaho Code, and further that the Idaho Guest Statute is the law which is applicable to this case. Respondent further admits that the only portion of the Idaho Statute with which we are concerned here is whether or not the conduct of the appellant amounted to "reckless disregard". Appellant has called the attention of the court to the definitions of the Idaho Guest Statute as set forth in *Foberg vs. Harrison,* 71 Ida. 11, 225 P. 2d 69, (1950), and *Mason vs. Mootz,* 73 Ida. 461, 253 P. 2d 240, (1953) Respondent feels that the following definitions from *Dawson vs. Salt Lake*

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Hardware Co., 64 Ida. 666 at page 667, 136 P. 2d 733 at page 738, as quoted with approval in *Hughes vs. Hudelson,* 67 Ida. 10, 169 P. 2d 712, (1946), further explains the interpretation placed upon the Idaho Guest Statute by the Idaho Supreme Court, wherein the court stated as follows at pages 716 and 717:

> "It is evident, to my mind, that the Legislature by the use of the word 'reckless', following the word 'intentional', meant to hold the driver liable for a lesser degree of negligence than an 'intentional' act. A driver may accomplish the same result, however, by driving in a *manner* or at a *speed* that is dangerous (reckless), and yet do so with no special purpose to injure his guest or himself or intent other than to be going wherever or however he pleases, regardless of results.
>
> The word 'reckless' as used in this Statute is, in my opinion, not used as synonomous with 'a conscious indifference', 'willful disregard', or 'wanton disregard' of the rights of a guest."

The Utah Supreme Court in the case of *Shoemaker vs. Floor,* 117 Utah 434, 217 P. 2d 382, at page 384, sets forth the basis on which an Idaho guest action must be considered when heard in Utah:

> "The principal question, therefore, is whether or not the conduct of the defendant as testified to by the plaintiff, may be found by the trier of the facts, to constitute 'reckless disregard', of the safety of the plaintiff within the means of the Idaho Guest Statute, Cases from several jurisdictions having similarly worded Statutes are cited by appellant and respondent in support of their respective positions. However, since the court is applying the Statuatory Law of Idaho,

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> we must give to such law construction placed thereon by the Supreme Court of that State if such construction has been made. Appellant's contention that 'reckless disregard of the rights of others' is equivalent to 'wilful misconduct' as used in the Utah Guest Statute, in our opinion has been rejected by the Idaho Court."

In discussing the facts of the Shoemaker case as applied to the Idaho Law, the Utah Court says on page 386:

> "While in several jurisdictions with statutes similar in wording to that of Idaho, Defendant might have been entitled to a nonsuit under the stated facts, the two cited cases from Idaho, (*Hughes vs. Hudelson,* supra, and *Dawson vs. Salt Lake Hardware Co.,* 64 Ida. 666, 130 P. 2d, 733) convinces us that the question of 'reckless disregard for the safety' of the Plaintiff was for the trier of the facts." (parenthesis ours)

Appellant cites a New Mexico case in his brief, and even though the New Mexico and the Idaho Guest Statutes may be very similar, the Utah Supreme Court has clearly adopted the position that the interpretation to be placed on the Idaho Statute is the one placed by the Idaho Supreme Court, and not that placed by the courts of other states having similar statutes. However, it should also be pointed out that there is one important distinguishing feature between the New Mexico case and the instant case. The New Mexico case occurred at night, wherein the instant case occurred in broad daylight.

Appellant appears to place great reliance upon the

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Idaho case of *Turner vs. Purdem,* 77 Ida. 130, 289 P. 2d 608, (1955).

The fact situation in the Turner case was as follows: At about 9:30 P. M. in the month of October, Turner was riding in an automobile driven by Purdem, which was travelling at a speed of 45 to 50 MPH. At the same time one Dye was driving a farm tractor towing a potato-digger in the same direction that the Purdem car was travelling. The tractor had a white light 4¼ in. diameter located so that it shone slightly downward but at a level above the potato digger. There were no yellow or red lights, or reflectors on the rear of the tractor, nor lights or reflectors of any kind on the rear of the potato digger. When Purdem was one-half mile behind the potato digger he saw the white light, and he testified that he did not see the light any more until he was within 25 or 30 feet of the digger; at this time he did not have time to apply his brakes to avoid colliding with the potato digger and injuring Turner.

In the Turner case the trial court granted Purdem a non-suit. The Idaho Supreme Court affirmed the judgment of the trial court. The facts of the Turner case are clearly distinguishable from the facts of the instant case in almost every important particular.

First: The Turner collision took place at night under windy and somewhat dusty conditions.

Second: Neither the tractor nor the potato digger was equipped with red lights or red reflectors, the only visible light being a white light on the tractor that was pointing downward.

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In the case now before the Court, the collision took place on a dry road, on a clear, bright day with no obstructions of any kind to appellant's vision. Testimony in the instant case further shows that Karen Wright, the person sitting next to the appellant, saw the tractor and hay-rack two city blocks away, (113); that the boy on the tractor saw the automobile as the tractor came upon the highway, and at that time he estimated the distance of the automobile from the tractor to be about one-half mile (103). The clear distance at which the tractor and hay-rack could have been seen by appellant was from thirty-five one-hundreths to fifty-five one-hundreths of a mile (71).

Third: There was no factor of high or dangerous speed in the Turner case. The only evidence being that the Defendant was driving 45 to 50 MPH, which was apparently within the speed limit for the area concerned.

In the case now before the court the evidence shows that the appellant was driving 70 MPH shortly before the impact (112), that he did not reduce his speed upon approaching the tractor and hay-rack, and that only at the last possible moment did he swerve to attempt to pass the hay-rack on the right (114), and in doing so the car struck the hay-rack, overturned and came to rest on its top in the barrow pit some 235 feet down the highway. It is submitted that the facts of the case now before the court can be distinguished from the facts of the Turner vs. Purdem case in every important particular.

Appellant suggests in his brief that perhaps he is guilty only of momentary inattention. An examination

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of the acts of the appellant shows that he was guilty of a 'reckless disregard' of the safety of others. His actions clearly show he was operating his automobile exactly as he pleased, regardless of the consequences to others. Such a course of action can hardly be called 'momentary inattention'.

In broad daylight an object as large as a hay-rack and tractor came upon the highway when the appellant was about two city blocks or approximately 1000 to 1200 feet away. The slow moving tractor and hay-rack, which the evidence shows was moving at the speed of 4 to 5 MPH, had time to get fully upon the highway and travel down the highway a distance of 80 feet and was almost stopped at the time of impact. Meanwhile, appellant did nothing except to continue at full speed ahead, then when he was almost on top of the hay-rack, he attempted to pass on the right and lost control of his automobile. The evidence is without dispute, that even at 70 MPH, including reaction time, appellant could have brought his automobile to a complete stop within a distance of 282 feet (172).

The evidence further shows that the distance travelled by the tractor from the point of its entry upon the highway to the point where it was at the time of the collision would be at least 83 feet, (Plaintiff's exhibit D), and the tractor moving at a speed of 4 MPH would take 13-5/6 seconds to cover the distance of 83 feet, or if the tractor were moving at the speed of 5 MPH it would take 10.8 seconds to cover the distance of 83 feet. (The figures on the speed of the tractor are taken from page 91 of the record.) Then taking into consideration

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the speed of the automobile at 70 MPH which equals 102 feet per second it is apparent that Defendant's automobile must have been 1407 feet to the north of the tractor when the tractor pulled onto the road if the tractor were travelling 4 MPH; or 1101 feet to the north of the tractor if the tractor were traveling 5 MPH.

POINT II

IT IS PRESUMED THAT THE JURY OBEYED THE INSTRUCTION OF THE TRIAL COURT TO DISREGARD THE REMARKS TO WHICH APPELLANT TOOK EXCEPTION, AND IT WAS A PROPER EXERCISE OF JUDICIAL DISCRETION FOR THE TRIAL COURT TO DENY MISTRIAL

The admonition of the court to the jury to disregard the remarks complained of in respondent's opening statement protected the rights of the appellant, and it was a proper exercise of judicial discretion for the trial court to deny a mistrial.

The trial court admonished the jury to disregard the remarks to which appellant had taken exception, and directed the jury that the statement had no bearing on the facts of the case and should not be regarded by them in either their deliberations or in their adjudication of the case. (Supplemental record page 6)

There is a presumption that the jury obeyed the instructions of the court to disregard the objectionable remarks. The rule is set out in 53 *Am. Jur.*, Section 505, at page 407, as follows:

> "Since in many cases the effect of improper argument can be remedied by an instruction to the

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jury to disregard it, the courts generally require in order to predicate errors thereon, that an objection must be made at the time of the improper statement, so that an opportunity may be given to the attorney making the misstatement and the court to rectify the damage. Dependant upon the circumstances of the particular case, sometimes the mere sustaining of an objection to the improper remark or the mere sustaining of an objection together with an admonition to counsel, would be sufficient to remove the injurious effect thereof."

In the case of *Potter vs Cave,* 98 N. W. 589 (Iowa), the court stated the rule as follows:

> "It not infrequently happens that in opening a case a counsel makes statements of an intention to prove matters as to which the evidence is subsequently rejected by the court, and when the statement is not unreasonable in itself, but is made in good faith we would not hold that error was committed even though the court should afterward properly exclude the evidence relied upon."

In the case of *Yechout vs. Tesnohlidek,* 150 N. W. 199, at page 200, the Nebraska Supreme Court adopted the following rule:

> "In making statements to the jury the plaintiff is entitled to 'briefly state his claim' and may state the evidence by which he expects to sustain it (Nebraska Code). In all cases, reasonable latitude must be allowed in what the party 'expects' to prove. The fact that he may fail to establish facts which he may have expected to prove does not necessarily establish that the statement was intentionally false. The incidents referred to, even if not proved, were of a trivial

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matter, not material to a recovery and we cannot conceive any prejudice resulting therefrom."

The rule is stated in 88 *C. J. S.* at page 399, as follows:

> " . . . and whether an admonition to the jury is sufficient to eradicate the prejudicial effect of the misconduct is largely a matter within the discretion of the trial court."

In the case of *Baker vs. The Market-Street Railway,* 11 P. 2d 912, the California court, at page 915, quoted the following rule from the previous California case of *Tingley vs. Times-Mirror,* 89 Pac. 1097, 1106,

> "It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have."

It is submitted that the statement made by respondent's counsel in his opening statement, to the effect that the parties purchased a six-pack beer, was not a remark of such a character as to create an "extreme situation" that was not readily cured by the admonition of the trial court to the jury that the jury should disregard such remarks and not consider them in their deliberations. Respondent also points out that there was never any subsequent reference made to the subject throughout the entire three day trial.

Further, respondent does not concede that a statement to the effect that the parties of the lawsuit purchased a six-pack beer some four hours prior to the

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time of collision was a prejudicial statement, even though respondent's complaint did not allege intoxication on the part of the Appellant.

In the case of *Jolly vs. Clements,* (Cal.) 82 P. 2d 51, the court considered the question of evidence concerning the use of intoxicants by the defendant, where trial court refused to submit the question of intoxication to the jury in a special interrogatory, and, at page 56, the court commented as follows:

> "The extent to which appellant had been drinking was a circumstance that the jury had a right to consider in deciding whether a proper lookout had been kept. There is no claim here of appellant having been heavily intoxicated. If the liquor had any effect on the attention which he gave to the condition of the road in front of him, or upon the keenness with which he observed it, then the fact that he had taken the drinks was still but one ingredient, among other ingredients, such, as for example the natural weariness of a person who had been without sleep until that hour in the morning, that the jury may have believed to have affected the clarity of his observation and the keenness of his judgment at the time of the accident."

A similar question came before the Colorado Supreme Court in the case of *Foster vs. Redding,* 45 P. 2d 940, and the Court in ruling on the question, at page 942, stated as follows:

> "It follows that the rulings on the instructions concerning 'wilful and wanton disregard' as distinct from those elements involved in intoxication, though technically erroneous had the sobriety of

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the driver been a question of doubt, are here totally devoid of prejudice. It is therefore unnecessary to further examine these rulings though we detect no error in them."

Counsel for the appellant, at the time the objection was made to the court concerning the statement of respondent's counsel, asked the court that an explanation be made thereof to the jury (Supplemental transcript page 2). The court, in making the requested explanation to the jury, embodied all of the remarks requested by the counsel for the appellant, and it appears that counsel for appellant is now in no position to contend that he was entitled to a mistrial.

POINT III

THE APPELLANT'S MOTION TO DISMISS, MOTION FOR A DIRECTED VERDICT, AND MOTION FOR A NEW TRIAL WERE PROPERLY DENIED BY THE TRIAL COURT.

Appellant's Motion to Dismiss and Motion for a Directed Verdict, for purposes of the motions, admitted the truth of the evidence before the court and jury, together with all fair, reasonable, and legitimate inferences favorable to Respondent. The trial court, under the circumstances, had to decide whether there was sufficient evidence to go to the jury, or stated in another way, whether there was sufficient evidence to sustain a verdict in the event the jury should find in favor of the Respondent.

The foregoing principles of law have been followed by the Utah Supreme Court in the case of *Nielsen vs. Hermanson,* 109 Ut. 180, 166 P. 2d 536, where the court

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in reversing a directed verdict said, at page 537:

> "On a motion by defendant for a directed verdict in his favor, the evidence must be viewed in the light most favorable to plaintiff. As it is often put, if the evidence is favorable to plaintiff, with all reasonable inferences and intendments that can be drawn therefrom could sustain a verdict for plaintiff the cause should be submitted to the jury."

A consideration of the evidence and the reasonable inferences therefrom, in the case now before the court, certainly sustains the rulings of the trial court. A driver who travels at a speed of 70 MPH, disregards the warnings and protests of a guest, strikes a hay-rack and tractor in broad daylight, then careens down the road into the barrow pit, overturns several times and comes to rest 235 feet from the area of the impact, certainly cannot seriously contend that such evidence, together with the reasonable inferences that can be drawn therefrom, is insufficient to make out a prima facia case of "reckless disregard for the rights of others".

In the case before the court the trial judge ruled that the evidence offered in support of Respondent's case was sufficient to allow the case to go to the jury; and the jury, after hearing all the evidence, found in favor of Respondent. The matter was again reviewed by the trial judge on Appellant's motion for a new trial, and after reconsidering all the evidence, as well as the alleged errors of the court, the trial judge denied the motion for a new trial permitting the jury's verdict to stand.

Appellant courts have frequently laid down and ad-

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hered to the rule that wherever a verdict is supported by substantial evidence it should be regarded as presumably correct, and strength is added to this rule where the case has been reviewed by the trial judge sitting in effect as a ninth juror and denying the motion for a new trial.

POINT IV

THE TRIAL COURT PROPERLY RULED THAT THE VETERANS ADMINISTRATION WAS NOT A REAL PARTY IN INTEREST AND NEED NOT BE NAMED AS A PARTY PLAINTIFF.

Prior to the time of trial, Appellant made no motion to have the Veterans Administration named as a party plaintiff although Appellant was advised by Respondent's answer to Interrogatory No. 11, which was filed on April 8, 1957, some eight months prior to trial, that the hospital and medical expenses incurred by Respondent at the Veterans Hospital would be claimed as a part of Respondent's damage (page 18 of Transcript of Pleadings). Appellant's motion to include the Veterans Administration as an additional party plaintiff was made on the second day of trial.

The court properly ruled as a matter of law that the Veteran's Administration was not a real party in interest, and therefore could not properly be joined as a party plaintiff. This ruling is supported by a decision of the United States Supreme Court in the case of the *United States vs. Standard Oil Company,* 332 U.S. 301, 67 Sup. Court 1604, 91 Law Ed. 2067, where the United States Supreme Court had before it a case in which the United States was the plaintiff suing for its loss of

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services of a member of the Armed Forces, who sustained injuries in a traffic accident caused by the wrongful act of an employee of the Standard Oil Company. The serviceman was unable to perform his duties for 29 days, and the Government instituted suit to recover the wages paid to the soldier and the reasonable value of the medical care furnished him in connection with the treatment of his injuries. The Supreme Court held that the matter of the Government being able to sue for the damages resulting to it from a tortious injury to a member of the Armed Forces was a matter of fiscal policy. Since Congress had enacted no legislation providing the government with a right of action against third persons whose wrongful acts cause injury to members of the Armed Forces resulting in damages to the government, the court held that the government had no right of action for such damages.

Based upon the foregoing case which is the leading case on the subject, it is submited that there is no legal basis upon which the Veterans Administration could sue a wrongdoer for the value of services rendered to a veteran, and it would have been error for the court to have granted Appellant's motion to name the Veterans Administration a party plaintiff.

POINT V

IT WAS ENTIRELY PROPER FOR THE TRIAL COURT TO ADMIT EVIDENCE RELATING TO RESPONDENT'S OBLIGATION, IN THE EVENT OF HIS RECOVERY FROM APPELLANT, TO PAY THE VETERANS ADMINISTRATION FOR MEDICAL SERVICE RENDERED HIM IN THE VETER-

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ANS HOSPITAL.

The Utah Supreme Court has followed the majority rule which holds that the injured person may recover in full from a wrong-doer regardless of anything that the injured person may receive from a "collateral source" unconnected with the wrong-doer. In the case of *Martin vs. Sheffield,* 112 Ut. 478, 189 P. 2d 127, the Court adopted the following rule which is found at page 131:

> "We therefore note another contention of the appellant. He argues that plaintiff was not entitled to recover for loss of wages during the time she was disabled for the reason she was paid by her employer for those particular days. The undisputed evidence is that she obtained compensation by drawing on her accumulative sick-leave. In view of the fact that she lost the benefit of her sick-leave for future needs, under the facts of this case, the Court did not misdirect the jury on the issue of loss of income during the period she was unable to work."

The foregoing rule adopted by the Utah Supreme Court is consistent with the rule set forth in the *Restatement of Torts,* Section 920, Subsection (e), at page 434, as follows:

> "Where a person has been disabled and hence cannot work but derives an income during the period of disability from a contract of insurance or from a contract of employment which requires payment during such period, his income is not the result of earnings but of previous contractual arrangements made for his own benefit, not the tortfeasor's. Likewise, the damages for loss of earnings are not diminished by the fact that his employer or a third person made gifts to him

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> even though these may have been given because of his incapacity. Further, he may be able to recover for the reasonable value of medical treatment or other services made necessary by the injury although these have been donated to him."

The "collateral source" principle was examined exhaustively in the case of *Hudson vs. Lazarus,* 217 Fed. 2d 344, (1946). In that case, as in the case now before the court, the injured party received treatment at a Veterans' Hospital, but with this distinction—he did not make any assignment of any portion of what he might have been able to recover from a third party to the Veterans Administration. At that time, the Veterans Administration's regulation under which the Respondent's obligation was concurred had not be adopted. This fact is pointed out by the court in their opinion, at page 347 note 11, in which the Veterans Administration Regulation, under which Respondent's assignment was made, is discussed. The issue before the court in the Hudson case was as follows:

> In a personal injury action may the plaintiff recover from the defendant tort-feasor the value of all reasonable and necessary hospital services furnished to the plaintiff without a charge by a naval hospital because he was a Veteran? The court held that the 'collateral source' principle applied, and that recovery would be permitted for the reasonable value of such hospital services even though there was no obligation on the part of the plaintiff to reimburse the Veterans Administration.

The court at page 347 stated as follows:

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> "It is generally well settled that the fact that the plaintiff may receive compensation from a collateral source (or free medical care) is no defense to an action for damages against the person causing the injury." Citing *Sainsbury vs. Pennsylvania Greyhound Lines,* 4th Cir. (1950), 183 Fed. 2d 548, at page 550, 21 *ALR.* 2d 266.

In *Plank vs. Summers,* 203 Md. 552, 102 A. 2d 262, which was cited by the court in *Hudson vs. Lazarus,* the same rule applied where the court held: that in an action against a civilian for injuries to members of the Navy the value of medical and hospital services furnished the plaintiffs gratuitously by the Federal Government as a part of their compensation for services rendered were proper items for the jury's consideration in determining the amount of damages to be paid the plaintiffs by the defendant.

In the case of *Caudill vs. Victory Carriers, Inc.,* (D. C. Va.) 149 Fed. Supp. 11, the court held that an injured seamen was properly entitled to introduce evidence as to proper future medical expenses even though the injured seaman was a member of the armed forces at the time of injury and would be entitled to free treatment at a Veterans Hospital.

The most recent ruling on this subject was decided in March, 1958, by the 4th Circuit of the U. S. Circuit Court of Appeals in the case of *Rayfield vs. Lawrence,* 253 Fed. 2d 209. In this case the principal question before the court was the Defendant's contention that the instruction to the effect that if the jury found the defendant liable it could consider, among other elements of damage, the fair and reasonable value of the hospital

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and medical services rendered the plaintiff at the Naval Hospital, even though the plaintiff may not have actually expended any money for such hospital care and medical services. The court, at page 212, held that the instruction was a corect statement of law, and at page 213, the court stated the rule as follows:

> "It is well settled in most jurisdictions, including Virginia where this accident occured, that an injured person may recover in full from a wrongdoer regardless of any compensation he may receive from a collateral source."

In view of the law established by the cited cases as well as by the *Restatement of Torts* to the effect that the injured party may recover the value of the services rendered by the Veterans Hospital, even though there may be no obligation on his part to reimburse the Veterans Administration, it certainly should be clear that the court properly allowed evidence of Respondent's obligation to pay the value of such services to the Veterans Administration in the event of his recovery.

POINT VI

CONSIDERING THE PERMANENT NATURE OF THE INJURIES SUFFERED BY RESPONDENT, THE DAMAGES AWARDED ARE NOT EXCESSIVE, AND THE COURT PROPERLY ADMITTED EVIDENCE OF THE VETERANS ADMINISTRATION HOSPITAL BILL.

It is apparently appellant's contention as raised in his Point VI that it was error to permit the jury to know that if Respondent recovered from Appellant he was obligated to pay to the Veterans Administration

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the sum of $3300.75 for medical treatment rendered the respondent at the Veterans Hospital in Salt Lake City. Appellant does not deny that the treatment was necesasry, or that it was rendered to the Respondent.

Appellant cites *In re Behm's Estate,* 117 Ut. 151, 213 P. 2d 657, (1950), as authority for the proposition that Respondent cannot assign to the Veterans Administration a share of the proceeds he may recover from a tortfeasor. It is submitted that the opinion in the Behm case does not support such a proposition, but on the contrary is authority in full support of the action taken between the Respondent and the Veterans Administration as is shown in the following language of the court, at page 662:

> "In the first cited case, (*Richards vs. National Transportation Co.,* 285 N. Y. 870), the injured person assigned to a hospital a share of any proceeds he should acquire from any settlement or judgment to be paid by the tortfeasor. The court recognized that under the law of the State of New York the cause of action was non-assignable, but held that the assignment of a share of the proceeds was enforceable in equity." (parenthesis ours)

In the Behm case the following paragraph immediately succeeds the quotation in Appellant's brief quoting from page 663 of the case:

> "Under the rules announced, the assignment by the respondent of the proceeds, if any, that should be recovered by the malpractice suit instituted by appellant, is valid and enforceable."

The agreement made by respondent with the Veter-

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ans Administration Hospital is contained in plaintiff's Exhibit I, as follows:

> "I, Gary R. Wood, in consideration of the foregoing Reassignment, do hereby agree to reimburse the Veterans Administration from any damages that may be recovered in any action or settlement incident to the injuries for which hospital care and treatment was furnished, to the extent of the total reasonable charges for such hospital care, medical, surgical, clinical treatment and other charges received by him, less the proportionate share of said Veterans Administration for all costs, fees or other charges occasioned thereof."

The only basis upon which appellant contends that Respondent's damages are excessive is that the verdict was influenced by the fact that the jury was advised that Respondent was obligated to pay the Veterans Administration for the cost of his hospitalization in accordance with the agreement contained in plaintiff's Exhibit I.

Appellant avoids any reference to Respondent's injuries in making the contention that damages are excesive. The record shows Respondent was hospitalized at Montpelier, Idaho, from the date of injury on November 3, 1956, to November 13, 1956, and at the Salt Lake Veterans Hospital from November 13, 1956, until May 16, 1957, (plaintiff's Exhibit G.) Respondent had to pay the Bear Lake Hospital $307.65 and his physician and surgeon $192.35 (plaintiff's Exhibit E), in addition to the amount which he agreed to pay the Veterans Administration in the event of his recovery.

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The medical evidence concerning the Respondent's injuries shows that he sustained severe lacerations, beginning above the knee on the right leg, and extending down through the bend of the knee and on to the extreme right side of the leg (184, 185); that he had a permanent injury to the peroneal nerve and the tibial nerve (183, 194); that the nerve injuries resulted in a 50% loss of motor or muscle power in the right leg; that he has a loss of sensation down the back part of the right leg, over the heel and up the sole of the foot; that the ankle was stiffened as a result of a loss of power, (195); and that he had to undergo surgery, including skin grafts. The attending surgeon stated, that in his opinion, Respondent had suffered a 50% loss of function of the right leg, and that this was a permanent loss of function. These injuries, together with this loss of bodily function, were sustained by a young man 25 years of age. Certainly it cannot be said that a verdict of $15,510.00 was excessive when $3810.75 of the verdict was for medical expenses, nor can it be said that the jury was influenced by passion or prejudice in awarding this amount to a young man who had suffered the pain and disability of such severe and permanent injuries.

POINT VII

POLICE OFFICER ALVIN W. FOULGER WAS PROPERLY QUALIFIED AS AN EXPERT WITNESS, AND HIS EXPERT TESTIMONY WAS ENTIRELY MATERIAL AND RELEVANT TO THE ISSUES OF THE CASE.

The evidence shows that Police Sergeant Alvin W. Foulger was qualified as an expert witness by virtue of

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his eight years experience as a traffic officer on the Ogden City police force, by his specialized training at three different safety and traffic schools conducted by the National Safety Council, and further by his special studies concerning the scientific basis for evaluating speed on the basis of skid marks. (165) The California Appellate court in the case of *Wells Truckways vs. Cebrian,* 265 P. 2d 557, at page 564, states the rule that has been adopted by practically all appellate courts concerning the qualifications of a witness to testify as an expert:

> "The qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and where there is no showing of the clear abuse of that discretion, the ruling of that court will not be disturbed upon appeal. Where the witness has disclosed a sufficient knowledge of the subject to entitle his opinion to go to the jury the question of the degree of his knowledge goes more to the weight of the evidence than its admisibility." Citing *People vs. Haeussler,* 260 P. 2d 8; *Pitt vs. Southern Pacific Company,* 9 P. 2d 273; 10 *Cal Jur.* 963 sec. 220.

The Appellant objects to the denial of his motion to strike Officer Foulger's testimony on the ground that there was no evidence of brake marks at the scene of the collision, and that for this reason there was no basis for the answers of the officer to a hypothetical question regarding the number of feet in which an automobile could be brought to a stop from specified speed under conditions similar to those faced by Appellant. Appellant, apparently, misinterpreted the purpose of Officer Foulger's testimony. The officer's testimony was not

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introduced for the purpose of proving any specific speed on the part of the Appellant, but was introduced for the purpose of estabishing that if Appellant had made any attempt to stop when he saw, or could have seen the tractor and hay-rack coming onto the road, he would have had ample time and distance in which to stop. The great distance at which the tractor and hay-rack could have been seen from the automobile at the time they came upon the hard surface highway was testified to by Miss Wright, who was riding in the front seat of the automobile (113), and also by Mr. Wallentine who was riding on the tractor (103).

Appellant is bound by the well-established rule that when the physical facts and circumstances are such that he could, by looking, have seen the object of danger, it cannot be said that he looked and did not see it. Under such circumstances, it will be presumed that he either failed to look or that he failed to take any heed to what he saw.

All of the objections made by Appellant to Officer Foulger's testimony are objections that go to the weight of the testimony and have no bearing upon its admisibility. The court, therefore, properly denied Defendant's motion to strike this testimony.

POINT VIII

THE COURT'S INSTRUCTIONS TO THE JURY PROVIDED THE JURY WITH A FAIR AND LEGALLY CORRECT BASIS FOR CONSIDERING AND DELIBERATING UPON ALL ISSUES OF THE CASE.

The general rule regarding the manner in which an

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appellate court should evaluate the instructions of a trial court is stated in 89 *C. J. S.,* Trial Sec. 430, at page 11, as follows:

> "Provided they are consistent with each other, all instructions given in a case should be read together as a whole, each in the light of the others, and this rule with respect to the construction of instructions as a whole applies to special charges given in the request of either party. *Accordingly, instructions are not subject to exception where, when construed as a whole, they properly state the law, and this is particularly true where the jury are told that all instructions are to be considered as a series or as a whole."* (Italics ours)

The court's Instruction No. 31 specifically directed the jury that all of the instructions, though numbered separately, were to be considered as one connected whole, and the jury was advised that they were not to single out any one instruction and ignore the others.

It is submitted, that based upon the evidence, the court properly denied Appellant's requests No. 1 and No. 2 as these requests were an equivalent to a directed verdict.

Appellant objects to the failure of the trial court to give his request No. 6, but an examination of court's Instruction No. 12 reveals that the court gave his request No. 6 verbatum with the sole exception that the word, "misconduct", in the Appellant's request, was replaced with the word, "disregard", by the court, in order that the instruction would conform to the language of the Idaho Statute.

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The court's instructions, construed as a whole, fairly and completely present the matter to the jury, and they contain all of the elements that should be considered by the jury under the Idaho law. The fact that Appellant, in his brief, fails to specifically designate errors in a single instruction, that he claims to be erroneous, indicates that Appellant can find no error in the court's charge to the jury.

CONCLUSION

The court properly submitted the case to the jury, as the Respondent had proved every element necessary to establish his cause of action under the Idaho Guest Statute. The evidence on the manner in which the Appellant operated his automobile demonstrated clearly that Appellant had a reckless disregard for the rights and safety of the Respondent riding in his automobile.

The remainder of the Appellant's alleged errors relate to matters that were within the judicial discretion of the trial judge. In regard to these matters it is submitted that the trial judge gave thoughtful and careful consideration to each of them and rendered his decision in accordance with the law.

We respectfully submit that the judgment should be affirmed.

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